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IN THE

Supreme Court of the United States

October Term, A. D. 1941.

No. 840

CHARLES M. THOMSON, Trustee of the Chicago and North Western Railway Company, a corporation,

Petitioner,

vs.

WILLIAM F. BOLES,

Respondent.

PETITION FOR WRIT OF CERTIORARI. AND BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

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IN THE

Supreme Court of the United States

October Term, A. D. 1941.

No. .....

CHARLES M. THOMSON, Trustee of the Chicago and North Western Railway Company, a corporation,

Petitioner,

vs.

WILLIAM F. BOLES,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petition of Charles M. Thomson, Trustee of the property of the Chicago and North Western Railway Company, respectfully shows to this Honorable Court:

*SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is an action originally brought in the District Court of the United States for the District of Minnesota, Third Division, by respondent against petitioner, for damages for personal injuries sustained by respondent while in the employ of the petitioner as a brakeman. The petitioner is the

*Figures in parenthesis refer to pages of printed record.

Trustee of the property of the Chicago and North Western Railway Company, a railroad corporation.

Jurisdiction of the Federal District Court was properly grounded on allegations and proof that petitioner and respondent were engaged in interstate commerce at the time of the accident (R. 9). This brought the case within the jurisdictional requirements of the Federal Employers' Liability Act (U. S. C. A. Title 45, Sec. 51-59, incl., Act of April 22, 1908, Chapter 149, Sec. 1-9, 35 Stat. 65, 66; amended act April 5, 1910, Chapter 143, Sec. 1-2, 36 Stat. 291).

Trial was had before Honorable Robert C. Bell and a jury. There was a verdict for respondent in the sum of $21,500 (R. 383).

Petitioner's motions for judgment in petitioner's favor notwithstanding the verdict (R. 394-96), and for a new trial (R. 387-92) were denied (R. 394-96). Petitioner appealed from the judgment to the Circuit Court of Appeals, Eighth Circuit, (R. 383-84) where the judgment was affirmed. The mandate was stayed pending the filing of this petition (R. 437).

FACTS.

Near Kickapoo Junction, Illinois, petitioner's single track railroad running north and south (R. 154) crosses on a bridge spanning Kickapoo Creek. The northerly portion of this bridge was of wood construction (R. 154) and along the easterly side thereof was a wood guard-rail (Defendant's Exhibit 11, R. 197). Immediately west of the so-called guard-rail there was a planked walkway 2 feet 10 inches in width (R. 159). The guard-rail at the top leaned easterly 8 inches over the bottom portion (R. 240). The purpose of

this railing according to respondent was "for the protection when you walk across there" (R. 70). Prior to the accident petitioner had decided to rebuild the wooden section of the bridge, including taking out the entire guard-rail and putting in an all-new one (R. 241-42). To prepare for the contemplated work petitioner had removed a portion of the guard-rail and substituted six so-called temporary gates in the railing, which were made of new lumber (R. 231). Also petitioner had moved some of the stringers to which the uprights of the guard-rail were bolted, and had spliced some of the guard-rails. The gates and changes were necessary so that the stringers would not interfere with the contemplated work, and that the gate openings in the guard-rail might accommodate the hammer on the pile-driver when piles under the walkway were being driven (R. 237). On June 12, 1940, petitioner began driving piles in this bridge (R. 260). In this work was used a train consisting of a locomotive, a caboose, flat car, and pile driver. Respondent was a brakeman on this train. It was his duty to flag the train on to the bridge. He did this while walking along the walkway (R. 262). After one pile had been placed, he for a second time, flagged the train on to the bridge, using the walkway (R. 292). After this second movement the actual driving of the piles was begun. While the driving of the piles was in progress, respondent, for his own convenience, went to the guard-rail (R. 110), and, according to his own signed statement, sat on the rail (R. 115). At the trial, respondent testified that he did not sit on the guard-rail, but leaned against it (R. 113). While respondent was sitting on or leaning against the guard-rail Hannum, the conductor of the work train, approached him and placed his hand against the guard-rail. Almost immediately respond-

ent and Hannum fell from the bridge to the ground below, a distance of 22 feet (R. 81). After the accident the top piece of a portion of the old guard-rail was missing and the broken pieces were found on the ground below. There were only two witnesses who testified to the exact place where respondent sat on the railing. They were Peatschman, the engineer of the pile-driver, (R. 270) and Livingstone, the fireman on the locomotive (R. 294). Both state that respondent was sitting on one of the temporary gates in the railing. Respondent did not know whether he sat on a so-called gate or not (R. 133). Respondent denied that he told the claim agent of petitioner that prior to the accident he was sitting on the railing, but admitted signing a statement to that effect.

So far as material here, the points relied upon for reversal in the Circuit Court of Appeals were (1) errors in rulings on the reception and rejection of evidence; (2) prejudicial, inflammatory and unwarranted statements by plaintiff's counsel in his closing argument; (3) and errors in the court's charge and in refusing to instruct the jury as the defendant requested. The Circuit Court of Appeals in its decision decided each of these points adversely to the petitioner. That duly certified record, including all proceedings in said cause in said United States District Court of Minnesota, Third Division, and in said United States Circuit Court of Appeals for the Eighth Circuit is filed herewith, under separate cover.

JURISDICTION OF THE COURT.

The jurisdiction of this court is based upon Section 240 of the Judicial Code as amended by the Act of February 13, 1925, c-229, Sec. 1, 43 Stat. 398, Title 28, U. S. C. A. Sec. 347, providing for review by this court by certiorari of decisions of the Circuit Court of Appeals. The judgment of the United States Circuit Court of Appeals sought to be reviewed was entered on November 25, 1941 and mandate stayed until January 9, 1942. The date of the filing of this application for certiorari is shown by the clerk's stamp on the cover hereof.

Cases believed to sustain jurisdiction are:

Forsyth v. Hammond, 166 U. S. 506;

Gay v. Ruff, 292 U. S. 25

Penn. R. Co. v. Chamberlain, 288 U. S. 333.

QUESTIONS PRESENTED.

The questions presented by petitioner's petition herein for a writ of certiorari are:

(1) Whether, in an action under the Federal Employers' Liability Act (45 U. S. C. A. Sec. 51, Act of April 22, 1908, c-149, Sec. 1, 35 Stat. 65) for damages for personal injuries to an employe where the negligence is based upon the failure of the employer to use reasonable care to furnish the employes with a reasonably safe place in which to work, it was reversible error for the trial court to refuse to give the following requested instruction:

> "You are instructed that an employer does not owe the employe a safe place in which to work. All the employer is required to do is to use reasonable care to fur-

nish his employe a reasonably safe place in which to work and that when the employer has used such reasonable care to furnish his employe a reasonably safe place in which to work, he has discharged his full duty toward his employe in that regard" (R. 370-71).

(2) Whether, in an action under the Federal Employers' Liability Act, where the claimed negligence is based on the employer's failure to use ordinary care to furnish the employee with a reasonably safe place to work, it is reversible error for the trial court to charge the jury that the employer owed the absolute duty to furnish the employee with a safe place to work.

(3) Whether, in an action under the Federal Employers' Liability Act to recover damages for personal injuries to an employe, it is reversible error to permit plaintiff's counsel, over the objection of the defendant, to show that the injured employe is married and has a family (R. 59-60), and thereafter in his closing argument, to refer to that fact (R. 352).

(4) Whether, in an action under the Federal Employers' Liability Act to recover damages for personal injuries to an employe, a verdict in favor of the plaintiff can be sustained, when counsel for the plaintiff in his closing argument has made highly inflammatory statements and an unjustified and bitter and passionate attack on the defendant, his witnesses and counsel, tending to stir up resentment and arouse passion and prejudice of the jury.

(5) Whether, in an action under the Federal Employers' Liability Act to recover damages for personal injuries to an employe, it is the duty of the court on its own motion to protect a suitor in his right to a verdict uninfluenced by appeals of counsel to passion and prejudice, and whether it is reversible error not to do so.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

(1) In this case, the United States Circuit Court of Appeals for the Eighth Circuit, by its opinion herein, rendered on November 25, 1941, decided an important question of Federal law, in conflict with applicable decisions of the Supreme Court of the United States; namely, in that it held that under the Federal Employers' Liability Act (45 U. S. C. A. Sec. 51, Act of April 22, 1908, c-149, Sec. 1, 35 Stat. 65) for injuries to an employe where the issue is whether the employer has used reasonable care to furnish the employe with a reasonably safe place in which to work, the employer was not entitled to the following requested instruction:

> "You are instructed that an employer does not owe the employe a safe place in which to work. All the employer is required to do is to use reasonable care to furnish his employe a reasonably safe place in which to work and that when the employer has used such reasonable care to furnish his employe a reasonably safe place in which to work, he has discharged his full duty toward his employe in that regard."

(2) In this case the circuit court of appeals decided an important question of Federal law in conflict with an applicable decision of this court in holding that it was not prejudicial error to permit the plaintiff to show that he was married and had a family.

Penn v. Roy, 102 U. S. 451, 26 L. Ed. 141;

Seaboard Air Line v. Horton, 233 U. S. 492, 34 S. C. R. 635, 58 L. Ed. 1062;

Yazoo & M. R. R. Co. v. Mullins, 249 U. S. 531, 533; 39 S. C. R. 368, 63 L. Ed. 754;

B. & O. R. Co. v. Carroll, 280 U. S. 491, 496; 50 S. C. R. 182, 74 L. Ed. 566;

D. L. & W. R. Co. v. Koske, 279 U. S. 7, 49 S. C. R. 202, 73 L. Ed. 578.

(3) In this case, the United States Circuit Court of Appeals for the Eighth Circuit, by its opinion herein, rendered on November 25, 1941, decided an important question of Federal law in conflict with applicable decisions of this court in holding that a verdict should not be disturbed by reason of misconduct on the part of plaintiff's counsel in making unjustified and highly inflammatory statements and a bitter and passionate attack on the defendant, his witnesses and counsel, tending to stir up resentment and arousing passion and prejudice of the jury in the absence of a strict compliance with the following admonition of that court in an earlier decision:

> "In the future, to secure from this court as a matter of right, a reversal of a judgment because of improper remarks of counsel, in an argument made to a jury, the bill of exceptions must contain all arguments in full and must show, either that adequate objections and exceptions to rulings thereon were taken during the argument complained of, or that such remarks were specifically excepted to at the close of the argument."

N. Y. C. R. Co. v. Johnson, 279 U. S. 310, 49 S. C. R. 301;

M. St. P. & S. S. M. R. Co. v. Moquin, 283 U. S. 520, 51 S. C. R. 501.

(4) In this case, the United States Circuit Court of Appeals of the Eighth Circuit, in matters of importance, departed from the accepted and usual course of judicial pro-

ceedings so as to call for an exercise of supervision by the Supreme Court of the United States.

(5) In this case, the decision of the Circuit Court of Appeals announced principles and rules which are contrary to the decisions of the Supreme Court of the United States, and at variance with decisions of other Circuit Courts of Appeal.

PRAYER.

WHEREFORE, petitioner prays that a writ of certiorari be issued by this Court directed to the United States Circuit Court of Appeals for the Eighth Circuit to the end that the judgment of said Court of Appeals in said cause of Charles M. Thomson, Trustee of the Chicago and North Western Railway Company, a corporation, Appellant, v. William F. Boles, Appellee, No. 11,997, be reviewed by this Court, as provided by law, and that upon such review the judgment of said Court of Appeals in said cause, of date November 25, 1941, be reversed, and that petitioner have such other relief as to this Court may seem appropriate.

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Railway Company.
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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

OPINIONS OF THE COURT BELOW.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit, in the case of Charles M. Thomson, Trustee of the Chicago and North Western Railway Company, a corporation, Appellant, v. William F. Boles, Appellee, filed on November 25, 1941, appears on pages 419 to 435 of the printed transcript of the record, and is not yet reported. It will appear in volume .... Federal (2). .....

STATEMENT OF THE CASE.

The essential facts of the case are fully stated in petitioner's petition for writ of certiorari, and in the interest of brevity, are not repeated here. Reference will be made to such facts on the points involved, in the course of the argument which follows:

SPECIFICATIONS OF ERROR TO BE URGED.

The United States Circuit Court of Appeals for the Eighth Circuit in its opinion filed in this cause on November 25, 1941, erred—

(1) In holding that the petitioner was not entitled to its requested instruction No. 5, which reads as follows:

> "You are instructed that an employer does not owe the employe a safe place in which to work. All the employer is required to do is to use reasonable care to furnish his employes a reasonably safe place in which to work and that when the employer has used such reason-

able care to furnish his employe a reasonably safe place in which to work, he has discharged his full duty toward his employe in that regard."

(2) In holding that in an action under the *Federal Employers' Liability Act* for personal injuries, it is not reversible error for the trial court to charge the jury that the employer owes the employe the absolute duty to furnish him with a safe place in which to work (Exception, 379-80).

(3) In holding that in an action under the Federal Employers' Liability Act for personal injuries to an employe, plaintiff, over the objection of the defendant, may show that the injured employe is married and has a family, and thereafter in the closing argument may refer to that fact.

(4) In holding that in an action under the Federal Employers' Liability Act for personal injuries to an employe, a verdict in favor of the plaintiff can be sustained, when counsel for the plaintiff in his closing argument has made unjustified highly inflammatory statements and has made a bitter and passionate attack on defendant, his witnesses and counsel, tending to stir up passion and prejudice of the jury.

(5) In holding that in an action under the Federal Employers' Liability Act for personal injuries to an employe, the court need not protect a suitor in his right to a verdict, uninfluenced by appeals of counsel to passion and prejudice, in the absence of exceptions to the improper remarks of counsel.

SUMMARY OF ARGUMENT.

I.

The defendant was entitled to have the jury instructed, as requested, relative to the employer's duty to use reasonable care to furnish the employe with a reasonably safe place in which to work.

Seaboard Air Line v. Horton, 233 U. S. 492, 34 S. C. R. 635, 58 L. Ed. 1062;

Yazoo & M. R. R. Co. v. Mullins, 249 U. S. 531, 533; 39 S. C. R. 368, 63 L. Ed. 754;

B. & O. R. Co. v. Carroll, 280 U. S. 491, 496; 50 S. C. R. 182, 74 L. Ed. 566;

D. L. & W. R. Co. v. Koske, 279 U. S. 7, 49 S. C. R. 202, 73 L. Ed. 578;

Western Union Tel. Co. v. Morris, (CCA 8) 105 Fed. 49, 53;

Northern Central Coal Co. v. Hughes, (CCA 8) 224 Fed. 57, 59;

American Smelting & Refg. Co. v. Riverside Dairy & Stock Farm (CCA 8) 236 Fed. 510;

Bates County v. Wills (CCA 8) 239 Fed. 785, 794;

Wisconsin & Arkansas Lbr. Co. v. Day, (CCA 8) 35 Fed. (2d) 563;

Aetna Life Ins. Co. v. Moore, 231 U. S. 543, 34 S. Ct. 186, 58 L. Ed. 356;

Kaufman Dept. Stores v. Cranston, (CCA 3) 258 Fed. 917;

Penn. R. Co. v. W. F. Jacoby & Co., 242 U. S. 89, 37 S. Ct. 49, 61 L. Ed. 165.

II.

The Circuit Court of Appeals should have set aside the verdict and judgment, because of the error in admitting evidence showing that plaintiff was married and had a family, and the argument thereon made by plaintiff's counsel to the jury.

Penn. v. Roy, 102 U. S. 451, 26 L. Ed. 141;
C. & O. R. Co. v. Stojanowski, 191 Fed. 720 (CCA 2);
Lacorazza v. Cantalupo, 210 Fed. 875;
Southern Pacific Co. v. Ralston, 67 Fed. (2d) 958;
C. & N. W. Ry. v. Kelly, 74 Fed. (2d) 31;
C. & N. W. Ry. v. Kelly, 84 Fed. (2d) 569.

III.

The Circuit Court of Appeals should have set aside the verdict and judgment, because of the unjustified inflammatory argument, and appeals to passion and prejudice by plaintiff's counsel in his closing argument to the jury.

N. Y. C. R. Co. v. Johnson, 279 U. S. 310, 49 S. C. R. 301;
F. W. Woolworth v. Wilson, 74 Fed. (2d) 439;
Brown v. Walter, 62 Fed. (2d) 798, (CCA 2);
M. St. P. & S. S. M. Ry. v. Moquin, 283 U. S. 520, 51 S. C. R. 501.

IV.

The decision of the Circuit Court of Appeals is contrary to applicable decisions of the Supreme Court of the United

States, and is at variance with decisions of other Circuit Courts of Appeal.

Aetna Life Ins. Co. v. Moore, 231 U. S. 543, 34 S. Ct. 186, 58 L. Ed. 356;

Penn. R. Co. v. W. F. Jacoby & Co., 242 U. S. 89, 37 S. Ct. 49, 61 L. Ed. 165;

Western Union Tel. Co. v. Morris, (CCA 8) 105 Fed. 49, 53;

Northern Central Coal Co. v. Hughes, (CCA 8) 224 Fed. 57, 59;

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C. & O. R. Co. v. Stojanowski, 191 Fed. 720 (CCA 2);

Lacorazza v. Cantalupo, 210 Fed. 875 (CCA 2);

Southern Pacific Co. v. Ralston, 67 Fed. (2d) 958 (CCA 10);

N. Y. C. R. Co. v. Johnson, 279 U. S. 310, 49 S. C. R. 301;

M. St. P. & S. S. M. Ry. v. Moquin, 283 U. S. 520, 51 S. C. R. 501;

Brown v. Walter, 62 Fed. (2d) 798 (CCA 2).

ARGUMENT.

I.

Failure to charge as to legal duty reversible error.

This is an action under the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51-59, incl., Act of April 22, 1908, Chapter 149, Sec. 1-9, 35 Stat. 65, 66; amended act April 5, 1910, Chapter 143, Sec. 1-2, 36 Stat. 291), brought by the plaintiff to recover damages for personal injuries alleged to have been proximately caused by the failure of the defendant to use ordinary care to furnish the plaintiff, an employe, with a reasonably safe place in which to work.

The defendant duly requested the trial court to instruct the jury as follows:

> "You are instructed that an employer does not owe the employe a safe place in which to work. All the employer is required to do is to use reasonable care to furnish his employe a reasonably safe place in which to work and that when the employer has used such reasonable care to furnish his employe a reasonably safe place in which to work, he has discharged his full duty toward his employe in that regard" (R. 381).

An exception was taken to the refusal to instruct as requested (R. 380). The requested instruction was a correct statement of law, and was applicable to the facts in this case. To refuse to give this instruction or to advise the jury of the correct legal duty of defendant was reversible error.

Seaboard Air Line v. Horton, 233 U. S. 492, 34 S. C. R. 635, 58 L. Ed. 1062;

Yazoo & M. R. R. Co. v. Mullins, 249 U. S. 531, 533; 39 S. C. R. 368, 63 L. Ed. 754;

B. & O. R. Co. v. Carroll, 280 U. S. 491, 496; 50 S. C. R. 182, 74 L. Ed. 566;

D. L. & W. R. Co. v. Koske, 279 U. S. 7, 49 S. C. R. 202, 73 L. Ed. 578.

The Circuit Court of Appeals held that the trial court sufficiently covered the substance of the requested instruction by the use of the following language:

> "If you find from the evidence in this case that the plaintiff was not engaged in the performance of his duties in the usual and customary manner, or that there was not a defect in the material or construction of the railing mentioned in the evidence and that it was reasonably safe for the employees of the defendant in the performance of their duties, or if you find that the railing was not reasonably safe because of a defect in the material or construction, and, yet, that such defect was not the proximate cause of the plaintiff's injuries, in whole or in part, then your verdict should be for the defendant" (R. 375).

The part of the charge of the trial court quoted by the Circuit Court of Appeals, does not correctly state the rule as to the defendant's duty to use reasonable care. In this part of the charge the court in effect tells the jury that if the railing mentioned in the evidence was reasonably safe for the employes of the defendant, in the performance of their duties, or if the same was not reasonably safe because of a defect in material or construction, and if such defect was not the proximate cause of the plaintiff's injuries, in whole or in part, then the verdict should be for the defendant. In other

words, the court actually charged the jury that the defendant was an insurer of the safety of the railing, instead of advising them of the correct legal rule incorporated in the requested instruction. Plainly, the failure to give the requested instruction, which clearly and succintly set out the legal duty of the defendant, was prejudicial error (exception to the above charge (R. 379-380).

Where a defendant requests instructions on the concrete, crucial questions at issue, it is error to refuse such request, even though the questions may be covered by a general charge.

Western Union Tel. Co. v. Morris, (CCA 8) 105 Fed. 49, 53;

Northern Central Coal Co. v. Hughes, (CCA 8) 224 Fed. 57, 59;

American Smelting & Refining Co. v. Riverside Dairy & Stock Farm (CCA 8) 236 Fed. 510;

Bates County v. Wills (CCA 8) 239 Fed. 785, 794;

Wisconsin & Arkansas Lumber Co. v. Day, (CCA 8) 35 Fed. (2d) 563;

Aetna Life Ins. Co. v. Moore, 231 U. S. 543, 34 S. Ct. 186, 58 L. Ed. 356;

Kaufman Department Stores v. Cranston, (CCA 3) 258 Fed. 917;

Penn. R. Co. v. W. F. Jacoby & Co., 242 U. S. 89, 37 S. Ct. 49, 61 L. Ed. 165.

As stated by the court in Western Union Tel. Co. v. Morris, (CCA 8) 105 Fed. 49, 53:

> "The refusal of the court to give the instruction requested, therefore, violated the salutary rule that where the charge of a court states general rules of law govern-

ing the case, but fails to set forth the specific issues which the jury is called upon to determine and to apply the law to them, either party upon request is entitled to additional instructions which tersely and clearly state the crucial issues which the jury must determine and the law applicable to those very issues."

II.

Admission of evidence that plaintiff married and had family reversible error.

At the very outset of the trial, plaintiff's counsel propounded to the plaintiff the following questions:

Q. "How old a man are you?

A. 48.

Q. When were you 48 years old?

A. Last April.

Q. That is on April 24th?

A. Yes, sir.

Q. 1940?

A. Right.

Q. Are you a married man?

A. Yes.

Mr. Rietz: That is objected to as immaterial and prejudicial.

The Court: The answer may stand.

Q. Do you reside with your wife and family?

A. Yes.

Mr. Rietz: Same objection.

The Court: I think there was an answer before your objection, and the answer may stand.

Q. Do you have a family?

A. Yes, sir.

Mr. Rietz: That is objected to. Let me get my objections in.

The Court: Do not answer the question until an objection is entered, if there is an effort made to make an objection.

Mr. Rietz: I object to that as immaterial and prejudicial.

Mr. DeParcq: It is proper to show that the witness or the plaintiff is married or has a family.

The Court: I think perhaps the matter should not be pursued further" (R. 59, 60).

In personal injury actions, evidence that the plaintiff is married or that he has children is not admissible, and the reception of such evidence is reversible error.

Penn. v. Roy, 102 U. S. 451, 26 L. Ed. 141;
C. & O. R. Co. v. Stojanowski, 191 Fed. 720 (CCA 2);
Lacorazza v. Cantalupo, 210 Fed. 875;
Southern Pac. Co. v. Ralston, 67 Fed. (2d) 958
C. & N. W. Ry. v. Kelly, 74 Fed. (2d) 31;
C. & N. W. Ry. v. Kelly, 84 Fed. (2d) 569.

In *Penn. v. Roy*, (102 U. S. 451, 459, 460) this court said:

"There was an error committed upon the trial, to which exception was duly taken, but it does not seem to have been remedied by any portion of the charge appearing in the bill of exceptions. The plaintiff was permitted against the objection of the defendant to give the number and ages of his children—a son 10 years of age, and three daughters of the ages respectively of 14, 17 and 21. This evidence does not appear to have been withdrawn from consideration of the jury. It certainly had no legitimate bearing upon any issue in the case. The manifest object of its introduction was to inform the jury that the plaintiff had infant children dependent upon him for support and consequently that his injuries involved the comfort of his family. This

proof, in connection with the impairment of his ability to earn money, was well calculated to arouse the sympathies of the jury, and to enhance the damages beyond the amount which the law permitted; that is, beyond what was, under all the circumstances, a fair and just compensation to the person suing for the injuries received by him. How far the assessment of damages was controlled by this evidence as to the plaintiff's family it is impossible to determine with absolute certainty; but the reasonable presumption is that it had some influence upon the verdict."

As stated by the court in *Lacorazza v. Cantalupo,* 210 Fed. 875, 877-878 (CCA 2):

"We do not see what bearing the possession of a wife and seven children has upon a man's 'earning power'; but all questions as to the admissibility of such testimony in the Federal Courts is foreclosed by the opinion of the Supreme Court in Penn. v. Roy, 102 U. S. 451, 26 L. Ed. 141. It was there held that in actions of this sort such testimony is improper and should be excluded, and that it is reversible error to admit it over proper objections and exceptions.

"We regret much that we are constrained to reverse this judgment because in view of the injuries conceded to be received the amount of the verdict seems entirely reasonable and quite possibly the improper testimony did not operate to enlarge its amount; but unless this court is prepared to hold that it will not accept the rulings of the supreme court on questions of law, in cases precisely similar to these in which such rulings are made, we see nothing else to do except to reverse the judgment because of this error in the admission of testimony."

The Circuit Court of Appeals in the instant case stated—

"We have no reason to question his good faith in assuming

that it was proper to ask the questions above enumerated." The purpose that plaintiff's counsel had in mind in bringing out the fact that plaintiff was married, or whether he acted in good faith, is immaterial. Even though good faith on the part of counsel in bringing the marital status of the plaintiff before the jury could be considered, it is difficult to come to the conclusion that he acted in good faith when delivering the closing argument to the jury. He made the following statements,—"He has a wife and family, and he is in the hospital with a broken back" (R. 352). Again—"I will read that portion of it—'I have two children,—girls, aged 9 and 11. I am 48 years of age and married'" (R. 352). And at the conclusion of his argument he said—"Mr. Rietz would like to saddle the burden of the plaintiff and his family on to the public and taxpayers instead of upon this railroad company where it properly belongs" (R. 369). The only purpose of these unjustified statements was to induce a verdict based on prejudice rather than on the evidence.

The Circuit Court of Appeals attaches importance to the fact that later in the trial, defendant's counsel offered in evidence a statement given by the plaintiff, in which it appeared that the plaintiff was married, and had two children. When this exhibit was offered, the damage had already been done. The jury had been fully informed of the fact that plaintiff was married and had a family. Had plaintiff's attorney refrained from bringing into the case the marital status of the plaintiff, of course, that portion of the exhibit referring to the wife and family would not have been offered. The fact that it came into the case later, did not cure the error. *So. Pac. Ry. v. Ralston*, 67 Fed. (2d) 958.

III.

Affirming judgment based on appeals to passion and prejudice, reversible error.

The Circuit Court of Appeals refused to pass upon the impropriety of the closing argument of plaintiff's counsel, because it stated the defendant neglected to specifically except to each prejudicial statement in the argument, as the court held he was required to do in compliance with the following admonition contained in *London Guarantee & Accident Co. v. Woelfle*, 83 Fed. (2nd) 325:

> "In the future, to secure from this court, as a matter of right, a reversal of a judgment because of improper remarks of counsel in an argument made to a jury, the bill of exceptions must contain all arguments in full and must show, either that adequate objections and exceptions to rulings thereon were taken during the argument complained of, or that such remarks were specifically excepted to at the close of the argument."

After quoting this admonition the court said: "A consideration of the entire record impels the view that this verdict should not be disturbed by reason of the claimed misconduct of counsel, in absence of a strict compliance with the admonitions stated above." The position of the Circuit Court of Appeals is in direct conflict with this court's decision in *N. Y. C. R. Co. v. Johnson*, 279 U. S. 310, 49 S. C. R. 301, wherein this court said:

> "Respondents urge that the objections were not sufficiently specific to justify a reversal. But a trial in court is never, as respondents in their brief argue this one was, 'purely a private controversy * * * of no im-

> portance to the public.' The state, whose interest it is the duty of court and counsel alike to uphold, is concerned that every litigation be fairly and impartially conducted and that verdicts of juries be rendered only on the issues made by the pleadings and the evidence. The public interest requires that the court of its own motion, as is its power and duty, protect suitors in their right to a verdict, uninfluenced by the appeals of counsel to passion and prejudice."

A reading of the argument of plaintiff's counsel shows that the prejudicial statements were not designed to aid the jury in arriving at a fair verdict, but on the contrary, were designed to appeal to the passion and prejudice of the jury and to create an atmosphere of hostility towards defendant, his counsel and witnesses, and to generate a feeling of sympathy for the plaintiff and his family. Plaintiff's attorney called attention to the fact that the case was properly pending in the trial court. He then told the jury that "irrespective of whether he (defendant's attorney) would rather be down there at the local division point (of defendant) with their friends and relatives of their employes on the jury, and probably before some local judge who is a politician and who is up for re-election every four or six years. As I say, maybe that is where he would like to try this lawsuit" (R. 345).

That part of the argument starting on page 345 of the transcript, second paragraph, to page 347, ending approximately with the first paragraph on that page, has been assigned as error (See record pp. 403-405). It is too long to be set out in full in this brief. Counsel there told the jury that Congress conferred great benefits on the railroads about rate matters; that Congress had passed a lot of laws giving

the railroads land and had opened the Treasury of the Union, giving them the taxpayers' money, and then counsel went on and told the jury that the railroads called that sound legislation (R. 345).

After calling attention to the claimed benefits given the railroad, counsel then proceeded to say that in order to counteract some of the advantages possessed by the railroads, Congress had permitted their employes to choose the courts in which to try their cases. The argument proceeded, and defendant was severely and unjustifiably castigated. The jury was informed—"that when an accident like this happens and a man is injured or killed, almost before the blood is cool they have got their claim agents out there lining up witnesses and *building up a defense*, and taking photographs and preparing a plat and taking statements from the man in the hospital right after the accident, sometimes within a day or two, and he had no advice and he has no lawyer and he hasn't had a chance to consult anyone, but they are out there *building up* and *manufacturing* a defense right after the accident."

The criticism leveled at defendant for taking statements and preparing a defense was highly improper. *Swanson v. Swanson,* 196 Minn. 298, 265 N. W. 39. Counsel continued his charge that defendant was dishonest in the preparation of the trial of the case, saying:

> "Now, as I discuss the evidence I think I will convince you that this defense of theirs is a fraudulent and dishonest defense. I think I can establish it is a lie and an attempt from beginning to end as such, and more than that it has been framed. You can frame some witnesses, but not all of them and they could not get all of them to lie in this lawsuit. The man, Mr. Hannum, would not lie about this. Hannum told the truth. He

> is one of their witnesses and they called him and they had to call him. They did not call Hannum because they wanted to. He called Hannum because I hollered for Hannum when this trial started, for cross examination and he knew he was in the city and he knew he better get him on the witness stand or he would hear about it later in the argument" (R. 347-48).

The statement that the defense was dishonest,—a lie from beginning to end, and that it had been framed, was highly improper and called for a reversal. *F. W. Woolworth v. Wilson*, 74 Fed. (2d) 439; *C. & N. W. R. Co. v. Kelly*, 84 Fed. (2d) 569.

The defendant had offered in evidence defendant's Exhibits 7, 8, and 9, which were part of the railing involved. The exhibits were received in evidence. Counsel in his argument with regard to these exhibits made the following statement to the jury: "We will see whether he is wrong about the cause of this accident, and if it had not been for Scamp, you would not have seen this railing" (R. 348). The defendant interrupted and objected to this statement (R. 349). The court did not sustain this objection, but in part at least lent its approval to this line of argument, saying—"There is no evidence to that effect. I am not sure yet what counsel is going to say is within the record or not. There may be some reason that justifies that course of argument. Just be careful to keep within the record and within the bounds of legitimate argument, counsel" (R. 349). There was no reason that justified this statement of the trial court. Counsel had completed his statement and the court knew the record did not sustain the statement. In the face of that situation the trial judge, instead of sustaining the objection and admonishing the jury to disregard it, stated that he did not

know whether what counsel was going to say was within the record. Defendant was not objecting to what counsel was going to say, but to what he had already improperly said.

It was the claim of plaintiff that one Harry Montgomery had assisted in repairing the railing after the accident. Montgomery was not produced as a witness by either side. He was as available to the plaintiff as he was to the defendant. In spite of that fact plaintiff's counsel severely criticized the defendant for not producing him, saying—

> "Now, Scamp took the witness stand and he described this railing in some detail, and after that description they had to do one of two things, they either had to bring in the railing or they had to deny that description and they couldn't very well bring witnesses in here and deny or dispute Scamp without bringing in that railing. Now, let us see about Scamp, how right and how wrong he was. Scamp said he and Harry Montgomery repaired it. You did not hear him say anything about Harry Montgomery—you did not see any Harry Montgomery on this witness stand. Where is he? Where is that employe? He said he wants to bring in all the evidence and wants to show you everything. Mr. Scamp said that he and Harry Montgomery are the only ones which repaired that railing. Scamp said they put in two 2x4s. Maybe he was wrong, maybe it was just one, but I don't know, but the fact remains that his testimony that he and Harry Montgomery did the repair work is undisputed. They did not produce Harry Montgomery and they did not account for his absence" (R. 349).

In truth it appeared conclusively that Montgomery was not an employe of defendant at the time of the trial. Scamp, plaintiff's witness, had testified to this fact:

> Q. "So far as you know is he still in the employ of this railway company?

A. No—not at this time" (R. 57).

On June 17, 1940, defendant claim agent interviewed plaintiff at the hospital and Boles gave a statement in writing relative to the accident. This statement was introduced in evidence by the defendant, and is defendant's Exhibit 1 (R. 114-116). Boles wrote into this statement in his own handwriting, the following: "I have read this and it is true", and then signed it. He admitted on the stand that he had read the statement before signing it (R. 117). This statement contained the following: "I was facing somewhat to the west, back to the east, and with buttock I think against the top cross-piece of railing and I do not think I was sitting with my whole weight on same, but was leaning against it with a good deal of my weight" (R. 115).

In his closing argument counsel for plaintiff made the following statement to the jury:

> "You have a right to consider what you have seen in this court room. Lawyers who want to conceal something are always objecting to everything. They insist on technicalities. He talks about the frills in this lawsuit. All the frills in this case and all the smoke screens and side issues, they were all put in here by Mr. Rietz to try to confuse and befuddle this issue and to try to confuse this jury" (R. 354-55).

The defendant had introduced the testimony of Peatschman, the engineer of the pile driver, who was one of the men who saw Boles sitting on the railing. Counsel referred to Peatschman in this manner:

> "Now, the only other witness they called to indicate to any degree that the blame or fault should be on Mr. Boles' part, is Peatschman. *I have seen a lot of fancy*

liars, and I have seen some pretty fancy ones, but I can say truthfully to this jury that I never saw a more infamous or more vicious unprincipled liar in my life than that fellow Peatschman. I have seen some pretty good ones *and I have seen some dished up by this railroad company,* but they never had one like that fellow before. He is the star witness of the defense. Here is the kind of testimony they ask you to take and turn down Boles, a good old faithful employe. I couldn't do it. I couldn't do it. If I were in his place, to bring in testimony like that in a public American court room and ask the Court and jury to accept it and believe it against an old employe that worked for my company for 23 years, who has a broken back and cannot work any more, if I were in his position I would want to go home and cover my head in shame. I couldn't do it. I hope I never have to do it. Let us look at this fellow they brought in here. They do not bring in his foreman. They bring in Peatschman" (R. 360-61). (Italics supplied.)

Toward the end of his closing argument to the jury, plaintiff's counsel stated:

"Mr. Rietz would like to saddle the burden of the plaintiff and his family onto the public and the taxpayers instead of upon this railroad company, where it properly belongs. They were to blame for this accident and they ought to pay and they ought to pay adequately and they ought to be willing to pay adequately. Mr. Boles is a good faithful employe and he has been a good citizen. If he were not a man of good character, if he were not a good American citizen, don't you suppose you would have heard about it in this lawsuit. If you did not have a good report on him, if that man had any stain or blemish on his life or on his career, don't you suppose they would have blackened him if they could?" (R. 369).

To this argument an objection was made by defendant's counsel. The court disposed of the objection, as follows: "His reputation is assumed to be good. You may proceed on that assumption in this case. You may proceed" (R. 369.)

In order for this court to get the full force of the prejudicial argument made by plaintiff's counsel, the entire argument should be read (R. 344-369).

As aptly stated by the Circuit Court of Appeals for the second circuit:

> "A judge, at least in a federal court, is more than a moderator; he is affirmatively charged with securing a fair trial, and he must intervene sua sponte to that end, when necessary. It is not always enough that the other side does not protest; often the protest will only serve to emphasize the evil. Justice does not depend upon legal dialectics so much as upon the atmosphere of the court room, and that in the end depends primarily upon the judge" *Brown v. Walter*, 62 Fed. (2d) 798, (CCA 2).

In a case where no exceptions to the argument were taken, and where, for that reason, the Supreme Court of Minnesota declined to consider the error arising out of a prejudicial argument, this Court significantly said:

> "In actions under the Federal statute, no Verdict can be permitted to stand which is found to be in any degree the result of appeals to passion and prejudice."
>
> *M. St. P. & S. S. M. Ry. v. Moquin*, 283 U. S. 520, 51 S. C. R. 501.

Manifestly the defendant is entitled to a reversal so that there may be a verdict in this case uninfluenced by appeals of counsel to passion and prejudice.

IV.

Decision to be reviewed, in conflict with applicable decisions of this Court, and at variance with decisions of other Circuit Courts of Appeal.

The decision of the Circuit Court of Appeals in holding that a defendant is not entitled to a requested instruction which clearly and correctly states the law, even though it be assumed the matter was covered by a general charge, is contrary to the decisions of this court,

Aetna Life Ins. Co. v. Moore, 231 U. S. 543, 34 S. Ct. 186, 58 L. Ed. 356;

Penn. v. W. F. Jacoby & Co., 242 U. S. 89, 37 S. Ct. 49, 61 L. Ed. 165

and is contrary to other decisions of the Circuit Court of Appeals of the Eighth Circuit,

Western Union Tel. Co. v. Morris, (CCA 8) 105 Fed. 49, 53;

Northern Central Coal Co. v. Hughes, (CCA 8) 224 Fed. 57, 59;

American Smelting & Refining Co. v. Riverside Dairy & Stock Farm (CCA 8) 236 Fed. 510;

Bates County v. Wills, 239 Fed. 785, 794;

Wisconsin & Ark. Lbr. Co. v. Day, 35 Fed. (2d) 563

and is at variance with the decisions of other Circuit Courts of Appeal.

Kaufman Dept. Stores v. Cranston, (CCA 3) 258 Fed. 917.

Further, the general charge did not give the correct legal rule in this case.

The decision of the Circuit Court of Appeals approving the conduct of plaintiff's counsel in introducing evidence to the effect plaintiff was married and had a family, and referring to the same in his argument, is contrary to the decision of this court in *Penn. v. Roy*, 102 U. S. 451, and is at variance with the decisions of other Circuit Courts of Appeal, to-wit: *C. & O. R. Co. v. Stojanowski*, 191 Fed. 720 (CCA 2); *Lacorazza v. Cantalupo*, 210 Fed. 875 (CCA 2); *Southern Pacific Co. v. Ralston*, 67 Fed. (2d) 958 (CCA 10).

The decision of the Circuit Court of Appeals of the Eighth Circuit, refusing to consider the highly inflammatory argument, and appeals to passion and prejudice of counsel for plaintiff, in the absence of exceptions, is contrary to the decisions of this court in *N. Y. C. R. Co. v. Johnson*, 279 U. S. 310, 49 S. C. R. 301, and in *M. St. P. & S. S. M. Ry. v. Moquin*, 283 U. S. 520, 51 S. C. R. 501; and is at variance with the decision of another Circuit Court of Appeals, to-wit: *Brown v. Walter*, 62 Fed. (2d) 798, (CCA 2).

Therefore, petitioner prays that this Court issue its writ of certiorari to review the judgment of the Circuit Court of Appeals for the Eighth Circuit, and finally reverse said judgment.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

CHARLES M. THOMSON, TRUSTEE OF THE CHICAGO AND NORTH WESTERN RAILWAY COMPANY, A CORPORATION,

Petitioner,

vs.

WILLIAM F. BOLES,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING CERTIORARI

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I.

PRELIMINARY STATEMENT

(Figures in parentheses refer to pages of the record.)

This is a petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals of the Eighth Circuit in the above entitled cause. The opinion is reported in 123 F. (2d) 487. The action was brought to recover damages for personal injuries and jurisdiction is predicated upon the Federal Employers' Liability Act (35 Stat. 65, Ch. 149, 45 U. S. C. A., Sec. 51-59).

Petitioner's counsel have failed correctly to state the facts in their petition and supporting brief. They have failed to view the evidence in its aspects most favorable to respondent and have failed to give respondent the benefit of all reasonable inferences fairly deducible therefrom. However, in view of the nature of the questions presented, no detailed

statement of facts will be necessary. In deference to the rule of this court requiring the abbreviation of briefs, our supplemental statement of facts will be characterized by appropriate brevity.

THE QUESTION INVOLVED

Apparently petitioner now admits that the evidence was sufficient to sustain the verdict and it is not now contended that petitioner is entitled to prevail as a matter of law. The only questions raised by petitioner relate to the facts and to the evidence exclusively. There is no genuine dispute nor controversy concerning any applicable principle of law. There is no important rule of law at stake. The question, simply stated, is whether principles which are clear and undisputed were correctly applied by the trial and the appellate courts below. It is urged here as grounds for the issuance of a writ that:

1. The trial court erred in the admission of evidence;

2. The trial court erred in its instructions to the jury;

3. That respondent's counsel was guilty of misconduct.

We believe that it can easily be demonstrated in this brief that:

First: No special and important reasons exist that would warrant the issuance of a writ.

Second: There is no Federal question of substance involved unless rulings on evidence and nice questions of phraseology in the trial court's charge in practically every case under the Federal Employers' Liability Act are to be so considered.

Third: The legal principles involved are not in need of alteration or re-definition.

Fourth: That no prejudicial or reversible error was committed by the trial court.

We shall assume that the members of this court are familiar with the facts stated clearly and accurately in the opinion of the Circuit Court of Appeals (421-435). This opinion in itself answers each and every question raised by petitioner with the citation of appropriate authority.

II.

STATEMENT OF FACTS

The accident occurred and respondent was injured by the collapse of a bridge railing which resulted from decayed, defective wood and corroded metal and a negligent splice. The respondent was leaning against the railing for the purpose of transmitting signals to the engineer of his crew. These facts were established to the point of demonstration.

The bridge in question was not under any general reconstruction; the only work that was being done consisted of driving piles and getting ready to raise it later on in the season (55, 103, 104). The work was not intended to be completed for perhaps several years (185, 235, 270). In the meantime the bridge was in use for the operation of trains (253) and the walk-way and hand railing were supposed to be kept in good, safe condition while the work was in progress (235, 236, 254), especially for the protection of trainmen like Mr. Boles (255).

It was necessary and important to keep it safe while the work was in progress (254). This was the duty of the bridge and building crew and *not* the train crew (242).

The position which respondent occupied was the safest and most convenient of all because:

1. He was up against the railing and out of the way of

the men working around there and carrying tools and materials and walking to and fro on the foot path (74, 80, 110, 120).

2. It is necessary to stay clear of the steam and water and the chips that fly from the block of wood when the hammer is in operation (26, 79).

3. The crane can swing around and revolve and if you are close enough it will hit you (80).

4. The farther you get out from the side of the train in giving signals, the better the engineer can see you (81, 296).

5. The pile driver is wider than an ordinary car (80).

6. He couldn't give signals from the ground because it was down in a hole and too deep and he couldn't hear the pile driver foreman and the engineer couldn't see him (98-9).

7. The big plank or timber between the rail and the pedestrian walk has bolts sticking up several inches and a man cannot walk there safely (186, 187).

The employees frequently leaned on the railing and would holler to somebody on the ground if they wanted different things; other employees had been doing the same thing on the day of the accident (30, 31, 74, 75, 295). The conductor of the crew, who was respondent's superior officer, was occupying the same position at the time of the accident (215, 217). He, the conductor, testified as petitioner's witness that respondent's position and conduct were proper and customary (217-219). Just as the conductor started to lean against the railing, he heard a cracking or popping noise like splintering wood (218), and both of them fell backwards into space and down to the ground below (29, 81, 212).

The wood of the railing was weather rotted and decayed so that you could pick it out with your nails or a spike, and the nail holes were rusty and worn too large (34). The splice, applied to make the railing safe (156, 174, 191) was wholly inadequate for this purpose (257, 258).

III.

POINTS AND AUTHORITIES

A. The rule requiring ordinary care to supply a reasonably safe place to work was correctly given in the trial court's charge.

Southern Ry. Co. vs. Bennett, 233 U. S. 80.

Meyers vs. Pittsburgh Coal Co., 233 U. S. 184.

Woods vs. Lindvall (8th Cir.), 48 F. 62.

Cawman vs. Penn.-Reading Seashore Lines (3rd Cir.), 110 F. (2d) 832.

Kenmont Coal Co. vs. Patton, 268 F. 334.

Northern Pac. R. Co. vs. Schoeffler, 193 F. 627.

McDonald vs. City of Duluth, 93 Minn. 206, 100 N. W. 1102.

Penson vs. Inland Empire Paper Co., 73 Wash. 338, 132 Pac. 39.

Mercury Mining Co. vs. Chambers (Ark.), 102 S. W. (2d) 543.

Nolen vs. F. O. Engstrum Co. (Cal.), 166 Pac. 346.

Johnson vs. Doubleday, 102 Atl. 1038.

B. There was no reversible or prejudicial error in the admission of evidence.

Galveston, H. & S. A. Ry. Co. vs. Summers (Tex.), 278 S. W. 881.

Bird vs. Johnson, 199 Minn. 252, 272 N. W. 168.

Willett vs. Great Northern R. Co., 154 Minn. 10, 191 N. W. 260.

Egan Chevrolet Co. vs. Bruner, 102 F. (2d) 373.

C. The trial court did not abuse its discretion in denying a new trial on the ground of alleged misconduct.

1. The question is not open for review because of the failure of petitioner's counsel to make a timely objection.

Ocean Accident & Guarantee Corp. vs. Penick & Ford, 101 F. (2d) 493.

London Guaranty & Accident Co. vs. Woelfle, 83 F. (2d) 325.

2. Remarks provoked or invited by adverse counsel do not constitute prejudicial misconduct.

Fidelity & Casualty Co. of N. Y. vs. Niemann, 47 F. (2d) 1056.

Gooddale vs. Hathaway (Ore.), 39 Pac. (2d) 678.

Twachtman vs. Connelly, 106 F. (2d) 501.

U. S. vs. Socony-Vacuum Co., 310 U. S. 150.

IV.

ARGUMENT

A.

The Trial Court Correctly Charged the Jury With Respect to Petitioner's Duty to Exercise Ordinary Care.

It is contended by petitioner that "the court actually charged the jury that the defendant was an insurer of the safety of the railing, instead of advising them of the correct legal rule incorporated in the requested instructions" (Petitioner's Brief, p. 18). There is no merit in this claim. The Circuit Court of Appeals in its opinion quotes verbatim that

portion of the charge which was held to have sufficiently stated the correct rule (435). In addition to the excerpt quoted by the Circuit Court of Appeals, the following two paragraphs adequately and sufficiently cover the requested instructions of the petitioner and are sufficiently favorable to him (375):

> "The defendant is not an insurer of the safety of its employees or of the plaintiff in this case. The mere fact that an accident has occurred and that the plaintiff has been injured, does not justify a verdict for the plaintiff. A person may meet with an accident and sustain injury where no one is at fault or it may be that some third party was solely to blame, or it may happen that the person injured was the one at fault himself, and under such circumstances there can be no recovery. If the plaintiff's injuries resulted purely from accident, or if they were caused exclusively by negligence on the part of the plaintiff, then he is not entitled to recover. * * *"
>
> "* * * Of course, if the plaintiff was sitting on the railing and lost his balance and fell, he is not entitled to recover."

Thus it will be seen that the trial judge submitted petitioner's theory of the case and specifically advised the jury that petitioner was not an insurer. After outlining the claims of the parties, the court quoted from the Federal Employers' Liability Act, specifically calling attention to the use of the term "negligence" (373). The court then properly defined negligence (374). The trial judge also gave the customary instructions imposing the burden of proof upon respondent (376).

It is elementary that after the case is correctly submitted there should not be a reversal because of niceties of phraseology. If the principle of law be correct, that is sufficient. Whether it is couched in the exact phraseology of a requested instruction then becomes immaterial. The case of

Western Union Tel. Co. vs. Morris, 105 F. 49, 53,

relied on by petitioner, merely holds that in addition to the general rules, a party is entitled to an instruction which "tersely" states "the crucial issues." It is difficult to understand how the trial judge could more clearly and more tersely state the crucial issues than in the language above quoted that petitioner was not an insurer, that the accident itself did not warrant a recovery, and that if he lost his balance and fell he could not prevail. This more than meets the rule of the Morris case and with the portion quoted by the Circuit Court of Appeals (435) sufficiently advised the jury of the correct principle of law which governed and solved this controversy.

We note with interest that in the Morris case, *supra*, upon which petitioner places such great reliance, the first paragraph of the syllabus is as follows:

> "It is not error for a trial court to refuse to give instructions to the jury in the language of counsel, where the substance of these instructions is embodied in its general charge to the jury."

This principle is decisive and controlling on this branch of the argument.

B.

There Was No Prejudicial Error Committed by the Trial Court With Respect to the Admission of Evidence.

As found by the trial court and the Circuit Court of Appeals, respondent's counsel in good faith asked the respondent whether he was married and had a family and the respondent answered such questions before the objections were interposed. Petitioner's counsel did not move to strike the testimony from the record and did not request any instructions that the jury should disregard it (59, 60). He did nothing at all. When the belated objection was made, the trial court said:

"I think perhaps the matter should not be pursued further" (60).

The matter was not pursued further until petitioner's counsel opened up the subject both by evidence and argument.

He knowingly and intentionally introduced and took advantage of the same information upon cross examination, as follows:

1. By offering in evidence Defendant's Exhibit 1 containing the statement that plaintiff was married and had two children, girls, ages nine and eleven (114);
2. By then reading this entire Exhibit 1 to the jury himself (18);
3. By eliciting testimony that Boles had one of the kid's baby blankets cut up or folded to use in his brace (127);
4. By offering in evidence Defendant's Exhibit 3 and reading it to the jury (130), which was a letter written to the claim agent by respondent's wife;
5. By re-calling respondent for further cross examination and offering in evidence Defendant's Exhibit 13, which showed that respondent was married, and by reading this report of the accident to the jury (3, 6-10), which report was made out and written in the handwriting of respondent's wife (139);
6. By cross examining the plaintiff and asking him who accompanied him on the trip to Minneapolis and eliciting the answer, "my wife and my girls" (315);
7. By offering in evidence and reading to the jury himself Defendant's Exhibit 14 and by showing that it was written by Boles' wife (312, 313);
8. By mentioning Boles' family in the final argument and claiming credit for the railroad company having advanced $200.00 "to support his family in July" (330).

As noted by the Circuit Court of Appeals, a heated controversy developed upon the trial as to whether Defendant's

Exhibit 1 had been obtained by fraud and deceit. It was the claim of respondent that the claim agent by agreeing to advance money to respondent, took advantage of his necessitous circumstances. It was proper to show his situation at the time the money was advanced, or agreed to be advanced, and when the statements were signed, and the dependence of a family would be vitally important under these circumstances. But respondent was not permitted to show the entire situation and no further reference was made to the matter by respondent's counsel except to the extent necessary to answer petitioner's final argument.

The situation is thus very different from that presented in

Chicago and North Western Railway Co. vs. Kelly (8th Cir.), 74 F. (2d) 31,

wherein the very same judge who presided in the instant case, writing the opinion for the Circuit Court of Appeals, indicated that what transpired in the case at bar would not justify a reversal. It will thus be seen that the cases cited and discussed by petitioner's counsel are easily distinguishable.

Error without prejudice does not justify reversal. The doctrine of harmless error is incorporated in Rule 61 of the Rules of Civil Procedure for the District Courts of the United States. The doctrine was applied by the Minnesota Court in

Bird vs. Johnson, 199 Minn. 252, 272 N. W. 168:

> "Error in admitting evidence is no ground for new trial if the complaining party subsequently introduces substantially the same evidence."

The same rule applies in the Eighth Circuit Court of Appeals. See:

Egan Chevrolet Company vs. Bruner (8th Cir.), 102 F. (2d) 373.

Union Electric Light and Power Company vs. Snyder Estate (8th Cir.), 65 F. (2d) 297.

The mere disclosure, without comment, particularly in the absence of a motion to strike, of such a common and natural occurrence as that a man of the respondent's age should be married and have a family could not arouse the sympathy of reasonable jurymen. If this were true, a prejudicial result would follow if the wife and child of a litigant should attend upon the trial.

At any rate, the Circuit Court of Appeals has found that respondent's counsel acted in good faith and no prejudice resulted. In view of the provocative conduct and remarks of petitioner's counsel, to which attention will now be devoted, we cannot do better than to close this portion of the brief by quoting from the opinion below (433):

> "Nor should it be claimed that plaintiff's counsel was injecting inflammatory and prejudicial argument to the jury in this regard since it appears that, only a short time before, defendant's counsel in his argument emphasized that the company had paid plaintiff some $200.00 for the support of his family. All references to plaintiff's family were immaterial and unwarranted, but they were injected into the case by both counsel. Under different circumstances, the argument referred to might well justify reversal, but, for the reasons indicated, we do not believe the jury were improperly influenced or that any prejudice arose thereby."

C.

There Has Been No Abuse of Judicial Discretion in Denying a New Trial on the Ground of Alleged Misconduct.

At the close of the argument of respondent's counsel, petitioner made no objections, took no exceptions, and asked the court for no instructions concerning the statements now claimed to constitute misconduct (369). Again petitioner's counsel did nothing at all. Assuming that there was misconduct, it is settled that counsel must give his adversary

an opportunity to "eat his words," and he must, likewise, give the trial court an opportunity to remove the prejudicial effect of misconduct. The rule is the same in this court and in the court below.

As stated in

United States vs. Socony-Vacuum Oil Company, 310 U. S. 150, 238:

> "* * * In the first place, counsel for the defense cannot as a rule remain silent, interpose no objections, and after a verdict has been returned seize for the first time on the point that comments to the jury were improper and prejudicial."

As noted in the opinion below, the approved practice in the Eighth Circuit had been set forth with great care and exactness in

London Guaranty and Accident Company vs. Woelfle, 83 F. (2d) 325.

Petitioner's counsel was thoroughly familiar with the rule. He was counsel for the defendant in the Kelly case (8th Cir.), first appeal, 74 F. (2d) 31, 36; second appeal, 84 F. (2d) 569. Upon the first appeal the court stated that he had not properly protected his record by objection and indicated that the defeated party, after the case is ended and no objections entered, should not be permitted to select from a long argument apparently objectionable features and present them as grounds for a new trial. After this decision, the court then decided the Woelfle case and Judge Sanborn outlined the required procedure for future guidance. Upon the second appeal in the Kelly case, the court specifically held and stated that petitioner's counsel had followed the practice specified in the Woelfle decision.

If petitioner's counsel, with knowledge of the rule and approved practice, remained silent and intended to speculate upon the outcome and attempt to secure a new trial in the

event of an adverse verdict, he thus followed a course which has been condemned by both this court and the court below.

The approved practice in the Eighth Circuit, under the Woelfle decision, requires that in order to save the question of misconduct for review, counsel must either:

1. Make an objection, take an exception, or move for a mistrial at the time of the alleged misconduct,

or

2. Where it involves the closing argument, counsel may and preferably should make his objection, take his exception, or ask for remedial action at the close thereof and before the case is submitted to the jury.

The non-action of petitioner's counsel with knowledge of the rule, prevents review of the questions now attempted to be raised.

D.

Assuming the Question Is Properly Presented for Review, It Does Not Appear That the Trial Court Abused Its Discretion in Denying a New Trial.

Both the trial court and the Circuit Court of Appeals have found that no prejudice resulted to petitioner from the remarks of respondent's counsel. In the opinion below it was said (433):

> "This case is not, in our opinion, a close one on liability. No contention is made that the damages were excessive."

Both lower courts in the case at bar have found that there was no passion or prejudice. In the cases relied upon by petitioner, of which

> *Minneapolis, St. P. and S. S. M. R. Co. vs. Moquin*, 283 U. S. 520,

is typical, the finding was exactly the other way. In that

case the lower courts found the verdict was excessive because of passion and prejudice and, referring to such finding, this court said:

> "The finding is quoted above, and our sole concern is as to the action it requires."

It is submitted that logic and justice require that in the case at bar this court should, likewise, accept the finding of the trial and appellate courts.

So also in

New York Central R. Co. vs. Johnson, 279 U. S. 310,

the Circuit Court of Appeals found that the remarks of counsel were unjustified and prejudicial and it was further stated that the trial judge by failing to sustain the petitioner's objection, had enhanced the prejudicial effect of the argument. In the case at bar this court should accord similar weight and respect to the finding of the Circuit Court of Appeals above quoted.

It seems to respondent that he was entitled to a directed verdict in accordance with his motion therefor (327, 328), because he proved conclusively that the accident resulted from petitioner's negligence. No doubt the Circuit Court of Appeals had this in mind in stating that the case was not a close one. With reference to damages, there was no contention below that the verdict was excessive. Counsel for petitioner did not even incorporate the medical evidence in the record, therefore it cannot be said that the remarks of respondent's counsel influenced the size of the verdict, which is really moderate and conservative.

Elementary is the rule expressed by the Oregon Court in *Gooddale vs. Hathaway*, 39 Pac. (2d) 678:

> "Ordinarily, such argument would be grounds for reversal, but in view of the fact that counsel for the defendant threw down the gage of battle relative to the matter of insurance, we think he must abide the consequences. The range of argument rests largely in the

discretion of the trial court, and, in the instant case, we see no abuse thereof. If error was committed, it was invited. No doubt counsel for the plaintiff was delighted to accept the challenge and it must be conceded that he made the most of his opportunities, but we are inclined to the belief, under all of the circumstances, that the jury was not controlled by passion or prejudice. The verdict was not large."

Remarks Relating to Venue and Jurisdiction.

Petitioner's counsel set out on a deliberate campaign at the very opening of his argument to instill poison and prejudice in the minds of the jury and to inject into the lawsuit wholly extraneous and improper elements. He sought to take advantage of the suspicion, prejudice, and even the petty provincialism of a farmer jury. He endeavored to weave a web of dark suspicion and started out by telling the jury there were many "peculiar" circumstances that he couldn't fix in his mind, but that were important; that plaintiff's counsel apologized for the lawsuit being there (which was untrue); that it was "queer" it was in Minnesota; that if a juror went to a lawyer in Scott County, or Goodhue County, or Houston County, with a case against a railroad, that they would not let their lawyer sue it some place else but would say, "I don't want to run away." He further said, "That is what has happened in this case," and added, "You have a right in determining this case to take that into consideration" (329, 330). He criticized the respondent for not bringing the case in Pekin, Illinois, saying again, "Aren't those circumstances queer, to say the least?" (331). He sought to prejudice the jury against respondent because he had employed a doctor and a lawyer in Minneapolis and made a trip for that purpose (330).

Counsel for respondent then had the option of either objecting to such improper remarks, or of remaining silent and

answering them. He chose the latter course. He had a right to counteract the poison and the prejudice intentionally aroused by petitioner's counsel. If a lawyer resorts to tactics of this kind, he ought to have the good sportsmanship to remain silent when his adversary accepts the challenge and answers in explanation, justification and retaliation. He cannot take advantage of remarks that were invited or provoked by his own misconduct.

It may be noted that respondent's counsel asked the jury to listen to the charge of the court on the question and, in seeking to overcome this prejudice, requested the jury to disregard the matter in its entirety in their deliberations (347).

The trial court properly instructed the jury that the venue and jurisdiction were proper and that the case should receive fair and impartial consideration (377).

The Investigation and Production of Evidence.

In his argument petitioner's counsel directly placed the *bona fides* of himself and the defense in general before the jury. He said that down where he lived he had learned that it paid to be fair and not to overstep in the recital of facts or draw conclusions that are not proper (328-9). Largely outside the record, petitioner's counsel told the jury that he brought every witness that knew anything about the case, which was grossly untrue, and said that he had witnesses in the city but sent them back because they didn't know anything about the case, and told the jury, "I have been as fair in the trial of this lawsuit as I could be" (342). In parading his honesty and fairness, he then ended up by saying, "I gave it to you because I think that is the way to try a lawsuit. Give the jury all the evidence that you can and give it to them honestly, and I think you will agree I have put into this

lawsuit all the evidence whether it was good or bad" (342). At the time he made these statements, claim agent Adamson was sitting in the court room. This record shows that the plaintiff wanted to cross examine him and that counsel agreed to permit it. However, petitioner's counsel did not call the claim agent to dispute one single word that Boles said about the money deal, the statement, Defendant's Exhibit 1, or anything else. At the time when petitioner's counsel was telling the jury that he had produced all the evidence, that he had been fair and honest, that he had given them everything good and bad, he had, no doubt, in his very brief case the photograph that was taken the day after the accident wherein Livingston posed for Boles and in exactly the same position that Boles was occupying at the time of the accident (300-1). *This would be the most important item of evidence in the whole lawsuit.* It would go to the very vitals of the case. IT WOULD SHOW WHETHER PLAINTIFF WAS RIGHT OR WRONG IN CLAIMING THAT THESE EMPLOYEES ORIGINALLY TOLD THE STORY THAT BOLES TOLD UPON THE WITNESS STAND AND THAT THE CLAIM AGENT MANUFACTURED, FRAMED, AND TRUMPED UP THE DEFENSE. It will be remembered that Livingston changed his story and that he said to Boles and Kalar that the claim agent tried to get him to change his story of the accident (318, 323). Livingston originally claimed that Boles was not sitting on the railing but merely leaning against it (317, 323). He demonstrated the method in exactly the manner testified to by Hannum and Boles (323, 325-6). In the original account prepared the very day after the accident Boles said he was leaning against the hand railing, which was evidently defective (308-9). This was not satisfactory to the superintendent (141-2). On June 17th Mr. Adamson took Defendant's Exhibit 1 from plaintiff Boles. Adamson put the word

"sitting" in the statement although Boles did not use that language (140-1). Boles did not know that Adamson had slipped the word "sitting" into the statement (141). Before Boles signed the statement some man had been to see him and they made an agreement or had an understanding about advancing money (144). Then Adamson came along and took Boles' statement and during the discussion and conversation he told Boles he would be down to see him and advance him some money (144-5). Likewise, in the statement taken by claim agent Adamson there was the fraudulent insertion that "there was no cracking noise." This is contrary to all the testimony in the case and Boles said he overlooked it in the statement (143). Boles signed Exhibit 1 when he had a lot of pain and the claim agent put in things he didn't say (117).

We have this picture: Immediately after the accident Boles gave a statement in accordance with his version at the trial. The superintendent was not satisfied. A man named Sullivan from the railroad made a deal to advance Boles some money. The claim agent came along and had a conversation and discussion with him about the money and took a written statement. Nothing could be better calculated to lull an injured employee into a sense of security than to agree to give him money at a time when he needed it. Immediately after the accident, in fact the very next day, claim agent Adamson went out to the scene of the accident and had Livingston, an eye-witness, assume exactly the same position in which he saw Boles at the time of the accident. He obtained a photograph of Livingston in this position. Another employee took Hannum's part in the photograph (300-1). He took other photographs the same day, which were actually introduced in evidence. Nothing was said about the one which would be the most important of all, and there was not one word of explanation for its non-production. Liv-

ingston orally stated that Boles was not sitting on the railing before he changed his version. Hannum agreed right down the line with Boles and didn't change his version.

We submit to any fair and impartial mind that these facts, coupled with a reading of the cross examination of Peatschman, should be sufficient to at least permit the argument that this defense was a frame-up and a fabrication. When counsel told the jury that the defense was framed, he was deadly in earnest; and nothing has transpired and nothing has been said in petitioner's brief to alter this abiding conviction. The failure to put Adamson on the witness stand and the failure to produce the significant photograph, together with the failure to produce:

1. Any one who knew anything at all about the repair of the railing,
2. Anyone who knew anything at all about the installation of the gate or the moving of the upright,
3. Anyone who knew anything at all about the installation of the splice,
4. Anyone who knew anything at all about the inspection, maintenance, or condition of the railing either before or after the accident,

stamped this defense as a false and dishonest one; at least, petitioner's counsel having opened the door as to its *bona fides*, respondent's counsel had a right so to argue.

Petitioner's counsel complains because respondent's counsel drew the inference or conclusion that had it not been for the testimony of Scamp, Exhibits 7, 8 and 9 would not have been produced. Wasn't this a fair argument? Petitioner's counsel criticized the respondent for not producing more evidence and witnesses. He put his own fairness and honesty in issue and said to the jury, in reckless disregard of the truth, that he himself had produced all the evidence whether good or bad. At the time he made this statement he must

have known it was false. He knew that he had not produced the vital photograph which was the most important piece of evidence in the lawsuit and he must have known that he had produced none of the vital witnesses to testify concerning the condition of the railing, the repairs made, the splice and other factors. If those conducting the defense in this case were not fair enough to produce the photograph or the important witnesses, what reason is there to suppose that they would produce the rotten railing had it not been for the fact that Scamp testified that the pieces were preserved and that several days after the accident he had seen them in the office of the general bridge foreman at South Pekin in a bundle? (36) Scamp described the defects, the decayed wood and the corroded metal (34-39), and in most respects, he was right. Respondent's counsel disclosed the basis of his reasoning and the foundation for his statement and said that after Scamp described the railing and its condition in detail, "they either had to bring in the railing or they had to deny that description and they couldn't very well bring witnesses in there and deny or dispute Scamp without bringing in that railing" (349). Perhaps the trial judge had the same thought in mind when he said in response to petitioner's objection:

> "There may be some reason that justifies that course of argument" (349).

The reference to the non-production of Montgomery was clearly provoked by petitioner's counsel. He again opened the door. He criticized and somewhat ridiculed the respondent and his counsel and his investigator for not producing petitioner's employees as witnesses. Both in fact and in law, the employees of one party are not considered as witnesses readily available to the other party to a lawsuit. They are considered and deemed to be available only to their employer. Counsel knows this rule of law. That did not prevent him,

however, from saying (333):

> "Then they send their investigator out there and he interviews witness after witness and he interviews Scotty, who says that he is a very good friend of Boles. They did not send Scotty, their friend, up here. They didn't bring in any of the other fellows they interviewed."

Witnesses out of the state could not be subpoenaed. Any lawyer who has had any experience with lawsuits against railroad companies knows that the employees of the latter are in mortal fear for their jobs. They are systematically and invariably advised by claim agents to give no information. Ordinarily they refuse to talk at all. It is ridiculous to suppose that they would co-operate with the other side in a lawsuit against their employer. This is just ordinary, common, human experience. But the petitioner's counsel criticized respondent for not producing petitioner's employees, who were not available to him, of course, and then he went further and told the jury what an honest man he, counsel, had been in the lawsuit, how he had given them all the evidence, good or bad (342), how he talked to all the witnesses, sent those home that knew nothing, and then said that he had been as fair as he could be (342) and had given the jury everything he had (343). If respondent can be criticized for the non-production of unavailable witnesses, then cannot the petitioner also be criticized for the non-production of unavailable witnesses, particularly in a case where he has falsely claimed the credit in front of the jury for production of "all the evidence." It will be noted that respondent's counsel did not say that Montgomery was an employee, at the time of trial. The remark about Montgomery simply illustrates the wisdom of the practice approved by Judge Sanborn in the Woelfle case. It was an inadvertent statement that could and should have been remedied had counsel objected to it and it simply constituted

an answer to his own unfair, improper, unjustified remarks concerning the non-production of evidence by respondent.

Petitioner's counsel did not hesitate to attack the honesty and impugn the veracity of Mr. Boles or Mr. Scamp or Mr. Kalar. As an advocate, he probably had the right to call them liars if he wished. The attack of respondent's counsel on Peatschman has far more justification to commend it. This court, of course, has no opportunity to observe the conduct and demeanor of this witness. This court cannot possibly appreciate the atmosphere or the impression conveyed by this witness on the stand. This court cannot observe the demonstrations conducted by him in the court room at the request of petitioner's counsel (288). All of these advantages were possessed by the jury and the trial court and it was proper for them to take such factors into consideration; but if the members of this court will read the cross examination of Peatschman commencing on page 271 and continuing to page 288 of the record, it will be perfectly apparent to them that Peatschman was exactly what respondent's counsel called him—an unprincipled liar. The jury had an opportunity to compare his testimony with that of an honest and truthful witness like Hannum concerning the same events and the jury and the trial court had a right to agree with respondent's counsel and to find that he was a liar and a perjurer. It is therefore a startling innovation to find counsel contending that it is misconduct to call a witness a liar. We take it the choice of words is not of vital or controlling significance. In

United States vs. Socony-Vacuum Oil Company, 310 U. S. 150,

Government counsel classified liars into three categories, to-wit: the plain liar, the damn liar and the expert witness, and claimed that those who appeared on the other side of the case fell in the worst classification of all. This court refused

to reverse because of the argument.

The credibility of Peatschman was for the jury. There are factors which this court cannot appreciate on the cold record. He told a story that was physically impossible. When estimating time, he could give the seconds; when estimating distances, he could give the inches; and he claimed to have the vision of a superman in observing persons and events and the memory of a prodigy in recalling them. His testimony was inherently contradictory and conflicting and changed with each succeeding question. It was obvious to everyone who heard him that his testimony was wilfully false. Under such circumstances it is certainly the privilege of a lawyer to speak his mind fully and frankly concerning the veracity of a witness who claimed to have performed impossible feats, and to remember things that necessarily would be beyond the comprehension of any one human being.

E.

There Is No Conflict Between the Decision Below and the Authorities Cited by Petitioner.

Each case cited by petitioner on pages 31 and 32 of his brief has been carefully read and found easily distinguishable. None except the *Johnson* and *Moquin* cases, previously discussed in this brief, is of sufficient relevance to require comment, and to point out the particulars wherein such authorities are without application or to distinguish each one in detail would unduly prolong this brief. Suffice it to say that not a single point of conflict between such authorities and the decision under review has been found.

It is submitted that the trial court and the Circuit Court of Appeals having found that the verdict was not influenced by passion and prejudice, the doctrine of the *Moquin* case would require that such finding be accepted here. It would

be most anomalous to accept the finding in that case and to reject a contrary finding in the case at bar.

That the decision below was not based solely upon a rule of practice and procedure appears from the statement that the court was impelled not to disturb the verdict by reason of "a consideration of the entire record * * *" (434).

CONCLUSION

In the light of the matters thus presented, it is respectfully submitted that the present application falls far short of the requirements prescribed by the rules of this court governing the granting of Writs of Certiorari. The petition should accordingly be denied.

Respectfully submitted,

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